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John Morrall  
 Office of Information and Regulatory Affairs  
 Office of Management and Budget  
 NEOB, Room 10235  
 725 17<sup>th</sup> Street, N.W., Washington, D.C. 20503

Dear Mr. Morrall,

Thank you for the opportunity to comment on OMB's Draft Report to Congress on the Costs and Benefits of Federal Regulation. Rather than comment on specifics of your report, we identify general areas where OMB's methods appear to deviate from the current state of knowledge regarding methods of regulatory analysis. Enclosed are a number of articles that might assist **OMB** in updating its approach to assessing regulations and encourage still better regulatory programs from the agencies. For your convenience, we cite and summarize to each of the enclosed articles in the brief paragraphs that follow.

*Prompt Letters to Encourage the Production of Information by Industry*

Recent studies by **EPA** and the chemical industry have confirmed what has been documented since a 1983 study by the National Academy of Sciences -- that the vast majority of chemicals (over 90%) do not have even preliminary health screening data. See David Roe, *Toxic Chemical Control Policy: Three Unabsorbed Facts*, 32 *Envtl. L. Rep.* 10232 (Feb. 2002) (describing these and other studies). If the Bush Administration is truly committed to science-based environmental, health, and safety regulation, this data gap must be remedied. The Toxic Substances Control Act contains several underutilized authorities, 15 U.S.C. §§ 2603, 2618, that would permit the generation and collection of these data. OMB should prompt **EPA** to use these authorities aggressively. For extended discussions of the underproduction of vital information and ways that this underproduction problem can be reformed, see Articles #4 and 23

*Cost-Benefit Analysis: A More Sophisticated Approach*

A number of academics have published devastating critiques of the current use of cost-benefit analysis in public health and environmental regulation. It is not clear from the OMB Report that these criticisms of cost-benefit analysis have been considered or addressed. We urge **OMB** to review these critiques and revise its approach to cost-benefit analysis accordingly. For articles that provide important critiques of OMB's methods of cost-benefit analysis and that also provide alternative methods of assessing benefits and costs, comparing alternatives, and developing effective regulatory tools, see Articles #7-9, 12-14, 16, and 20.

## *Regulatory Reform and Transparency*

A number of academics have criticized agency risk assessments, particularly with regard to their lack of transparency. Many of these authors have also criticized contemporary regulatory reform efforts (alluded to in part at Chapter I of OMB Report at sections E and H) because these regulatory reforms exacerbate rather than combat the agencies' incentives to overstate the role that technocratic analysis plays in developing regulatory policy. These reforms also increase regulatory delays, administrative costs, and create a series of other administrative problems. For articles that critique agency risk assessment and regulatory reform efforts similar to those OMB endorses and that propose more productive reforms, see Articles #1-3, 5-6, 11, 14-15, and 17-21.

## *Environmental Justice*

**An** increasing body of evidence shows that the benefits and burdens of regulatory programs intended to protect public health are not shared equitably. Many of the heaviest pollution loads and other health insults affect communities of color or lower economic means. In Executive Order 12898, President Clinton attempted to draw the agencies' attention to this problem. OMB should encourage compliance with this Executive Order; acknowledge and address the potential conflict between cost-benefit analysis and equitable considerations; and advise the agencies on how to resolve these tensions. For a recent article presenting a critique of the implementation of Executive Order 12898 and suggesting reform, see Article #10.

## *Public Participation*

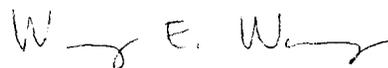
OIRA's effort to improve the transparency of OMB's decision-making has gone a long way to enhance public participation and trust in **OMB**. Enhancing transparency is only the first step towards improving the quality of public participation, however, and we believe OMB could do much more in this regard. For more general research and suggestions on improving public participation in regulatory affairs, see Articles #2 and 22.

Thank you again for the opportunity to comment on OMB's report.

Sincerely,

 B-7 WEN

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Indiana University School of Law



Wendy Wagner  
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- #1 John S. Applegate, *A Beginning and Not an End in Itself: The Rule of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643 (1995).
- #2 John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903 (1998).
- #3 John S. Applegate, *Comparative Risk Assessment and Environmental Priorities Projects: A Forum, Not a Formula*, 25 N. KY. L. REV. 71 (1997).
- #4 John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261 (1991).
- #5 John S. Applegate & Celia Campbell-Mohn, *Risk Assessment: Science, Law and Policy*, NR&E, Spring 2000, at 219.
- #6 Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93 (1999).
- #7 David M. Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, 31 ELR 10003 (2001).
- #8 David M. Driesen, *Should Congress Direct the EPA to Allow Serious Harms to Public Health to Continue?: Cost-Benefit Tests and NAAQs Under the Clean Air Act*, 11 TUL. ENVTL. L.J. 217 (1998).
- #9 David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545 (1997).
- #10 Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 ELR 10992 (2000).
- #11 Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) The Contract With America: Improving Environmental Policy or Destroying the Environmental Protection?* 5 KAN. J.L. & PUB. POL'Y 1 (1996). (Wendy--I think this page # is just for the offprint)
- #12 Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 CORNELL L. REV. 648 (2002).
- #13 LISA HEINZERLING & FRANK ACKERMAN, PRICING THE PRICELESS: COST-BENEFIT ANALYSIS OF ENVIRONMENTAL PROTECTION (2002).
- #14 Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L.J. 7 (1998).

- #15 Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996).
- #16 Thomas O. McGarity, *Health Benefits Analysis for Air Pollution: An Overview*, Congressional Research Service (January 1, 1989).
- #17 Thomas O. McGarity, *Risk and Trust: The Role of Regulatory Agencies*, in DEALING WITH RISK: THE COURTS, THE AGENCIES AND CONGRESS, 12.
- #18 Thomas O. McGarity, *Risk Assessment and Public Trust: The Role of the University*, in REGULATORY REFORM, 101.
- #19 Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979).
- #20 Sidney A. Shapiro & Robert L. Glicksman, *Goals, Instruments, and Environmental Policy Choice*, 10 DUKE ENVTL. L. & POL'Y F. 297 (2000).
- #21 Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).
- #22 Wendy E. Wagner, *Restoring Polluted Waters with Public Values*, 25 WM. & MARY L. REV. 429 (2000).
- #23 Wendy E. Wagner, *The Precautionary Principle and Chemical Regulation in the US*, 6 HUMAN AND ECOLOGICAL RISK ASSESSMENT 459 (2000).